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**IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JENNA KASKORKIS and KIM
 CARTER, individually and on behalf of
 all other similarly situated,

Plaintiffs,

v.

GENERAL NUTRITION CENTERS,
 INC., a Delaware Corporation,
 GENERAL HOLDINGS, INC., a
 Delaware Corporation,

Defendants.

Case No: 3:16-cv-00990-WQH-AGS

STATUS REPORT

Pursuant to the Court's November 16, 2016 Order, counsel for the parties Plaintiffs Jenna Kaskorkis and Kim Carter ("Plaintiffs") jointly with Defendants General Nutrition Centers, Inc. and GNC Holdings Inc. (erroneously named as General Holdings, Inc.) (collectively, "GNC" or "Defendants"), submit the following Joint Status Report.

I. PARTIES

A. Plaintiffs' and Plaintiffs' Counsel

Attorneys for Plaintiffs Jenna Kaskorkis and Kim Carter, and the putative class:

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II. NATURE OF THE CASE

A. Plaintiffs' Contentions

Plaintiffs' allegations against GNC are relatively simple: during the Class Period, GNC misrepresented the existence, nature, and amount of price discounts for products sold on its website by advertising fabricated former prices. On GNC.com, Defendants display a product's "Regular Price." This "Regular Price" is represented to be the purported market or former price of a given product. Immediately below the "Regular Price" is GNC's "Sale Price," which is lower than the "Regular Price" and displayed in red, bold font. The difference between these two prices is represented as a discount. But GNC's "Regular Price" representation is a sham. The "Regular Price" advertised for a given product does not represent a *bona fide* price at which GNC previously ever sold the given product. They are fictional creations designed to enable GNC's phantom markdowns. Accordingly, Plaintiffs and members of the putative class are not receiving the discount advertised.

Plaintiffs have alleged that Defendants' pricing practices violate the California Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE §§ 17200, *et seq.*, the California False Advertising Law ("FAL"), CAL. BUS. & PROF. CODE §§ 17500, 17501, and the California Consumer Legal Remedies Act ("CLRA"), CAL. CIV. CODE §§ 1750, *et seq.*

B. Defendants' Contentions

GNC denies the allegation that it misrepresented the existence, nature, and amount of price discounts on products sale by purporting to offer steep discounts off of fabricated, arbitrary, and false former prices. GNC further denies that it engaged in false or misleading advertising with respect to the prices of products listed for sale on GNC.com.

III. CASE MANAGEMENT SCHEDULED DATES

Magistrate Judge Jill L. Burkhardt set the following pretrial deadlines in this case [Dkt. No. 23]:

Event	Date
Plaintiffs to Designate Class Certification Expert in Writing	January 16, 2017
Defendants to Designate Class Certification Expert in Writing	January 23, 2017
Plaintiffs to Designate Class Certification Rebuttal Expert in Writing	January 30, 2017
Plaintiffs to file Class Certification	February 24, 2017
Plaintiffs to Comply with disclosures provisions in Rule 26(a)(2)(B)	February 24, 2017
Defendants' to file Opposition to Class Certification	March 24, 2017
Defendants' must Comply with disclosures provisions in Rule 26(a)(2)(B)	March 24, 2017
Plaintiffs to File Reply to Opposition to Class Certification	April 7, 2017
THE FOLLOWING SCHEDULE IF CLASS CERTIFICATION IS GRANTED	
Parties to Exchange Expert Disclosures	August 11, 2017
Last day to serve supplemental expert disclosures re: contradictory or rebuttal evidence under FRCP 26(a)(2)(D)	September 1, 2017
Discovery and expert discovery cut-off	September 15, 2017
Submit confidential settlement briefs to Magistrate Burkhardt	September 27, 2017 (Vacated)
Mandatory Settlement Conference	October 2, 2017

	(Vacated)
Pretrial Motions cut-off	October 6, 2017
Pre-Trial disclosure requirements	January 12, 2018
Last day to meet re: Local Rule 16.1(f)(4)	January 19, 2018
Plaintiff counsel responsible for preparing pretrial order and arranging meetings of counsel per Civil Local Rule 16.1(f)	January 26, 2018
Proposed Final Pretrial Conference Order documents lodged with the Court	February 2, 2018
Pretrial Conference	February 9, 2018 @ 11:00 a.m.
THE FOLLOWING SCHEDULE IF CLASS CERTIFICATION IS DENIED	
Parties to Exchange Expert Disclosures	June 23, 2017
Last day to serve supplemental expert disclosures re: contradictory or rebuttal evidence under FRCP 26(a)(2)(D)	July 14, 2017
Discovery and Expert Discovery cut-off	July 28, 2017
Submit confidential settlement briefs to Magistrate Burkhardt	August 2, 2017 (Vacated)
Mandatory Settlement Conference before Magistrate Burkhardt	August 9, 2017 (Vacated)
All pretrial motions due	August 18, 2017
Pre-Trial disclosure requirements	November 10, 2017
Last day to meet re: Local Rule 16.1(f)(4)	November 17, 2017
Plaintiff counsel responsible for preparing pretrial order and arranging meetings of counsel per Civil Local Rule 16.1(f)	December 1, 2017
Proposed Final Pretrial Conference Order documents lodged with the Court	December 8, 2017
Pretrial Conference	December 15, 2017 @ 11:00 a.m.

IV. STATUS OF SCHEDULED DATES

Given the pending Motion to Compel Further Responses to their First Set of Production of Documents and First Set of Special Interrogatories [Dkt. No. 33] to be heard January 25, 2017 [Dkt. No. 35], Plaintiffs propose extending all pending pretrial deadlines for two months. Defendants are considering the below proposal:

Event	Date
Plaintiffs to Designate Class Certification Expert in Writing	March 24, 2017
Defendants to Designate Class Certification Expert in Writing	March 31, 2017
Plaintiffs to Designate Class Certification Rebuttal Expert in Writing	April 7, 2017
Plaintiffs to file Class Certification	April 28, 2017
Plaintiffs to Comply with disclosures provisions in Rule 26(a)(2)(B)	April 28, 2017
Defendants' to file Opposition to Class Certification	May 26, 2017
Defendants' must Comply with disclosures provisions in Rule 26(a)(2)(B)	May 26, 2017
Plaintiffs to File Reply to Opposition to Class Certification	June 9, 2017

Additional pretrial deadlines can be determined after the Court's decision on class certification.

V. DISCOVERY STATUS

The parties have begun discovery. Plaintiffs served their First Set of Requests for Production of Documents and Special Interrogatories to General Nutrition Centers, Inc. on August 26, 2016. Plaintiffs served their Notice of Rule 30(b)(6) Deposition on December 27, 2016. Defendants have not served Plaintiffs with any discovery requests.

Due to the subject matter of the dispute, Plaintiffs believe it is likely that this case will involve discovery of a large amount of Electronically Stored Information ("ESI"). Plaintiffs have retained ESI consultants to aid the discovery process. Plaintiffs have repeatedly offered to make its ESI consultants available to outline procedures for limiting the burdens associated with ESI discovery.

Defendants disagree ESI consultants are necessary and disagree with Plaintiffs' assessment that this case will involve discovery of a large amount of ESI. This issue is one of the issues currently subject to Plaintiffs' pending motion to compel, which

1 Plaintiffs filed despite Defendants offer to provide a sampling procedure to
2 demonstrate that the vast discovery sought by Plaintiffs was improper.

3 **VI. DISCOVERY DISPUTES**

4 A dispute arose over Plaintiffs' First Set of Requests for Production of
5 Documents and Special Interrogatories:

6 **A. Plaintiffs' Contentions**

7 The transactions at issue were conducted on Defendants' website, GNC.com.
8 Most online retailers use e-commerce systems that are capable recording immense
9 amount of information, including historical pricing, transactional information, and the
10 identity of customers. When this information is recorded in an electronic database
11 (such as SQL Server or Oracle, both likely used at GNC), it can be extracted and
12 queried in an efficient and accurate manner. For example, a query can determine
13 when price changes occurred for each product on Defendants' website (and,
14 accordingly, when the product was last offered at its "regular" price). Undoubtedly,
15 this information is highly relevant to class certification, as well as the merits of the
16 action.

17 Defendants have done everything to prevent access to this highly relevant
18 information that resides in its database. Defendants' actions seem to be a calculated
19 attempt to prevent Plaintiffs from getting access to Defendants' computers systems,
20 which would likely provide the evidence on which Plaintiffs could establish the
21 commonality of liability and damages issues. This is borne out in Defendants'
22 response to Plaintiffs' First Set of Requests for Production of Documents and Special
23 Interrogatories.

24 Plaintiffs served their First Set of Requests for Production of Documents and
25 Special Interrogatories on August 26, 2016. The Requests and Interrogatories sought
26 information regarding product identification numbers (SKUs), pricing (member,
27 regular, and sale pricing), pricing data showing differences between online and in-

1 store products, pricing policies or manuals, proposed pricing changes, identification of
2 customers and their purchases, and Defendants' computer systems. These initial
3 discovery requests were part of a more detailed discovery plan that is vital if Plaintiffs
4 are to move for class certification in a timely manner.

5 Defendants responded to Plaintiffs' initial discovery requests on September 26,
6 2016 with either general objections or nonresponsive replies. For example, regardless
7 of the question posed, Defendants generally responded to Plaintiffs' Special
8 Interrogatories by stating that it "will designate one or more representatives with the
9 relevant knowledge," "will produce non-privileged, responsive documents that contain
10 information sufficient to demonstrate [how GNC set prices for/number of sales and
11 sale prices for/total revenue from the sale of] the three GNC products purchased by
12 Plaintiffs," or by simply refusing to answer the Interrogatory. Additionally, when
13 responsive documents were to be produced pursuant to either of Plaintiffs' pending
14 Document Requests or Interrogatories, Defendants failed to actually deliver such
15 documents or even provide a date by which such documents would be available.
16 These answers were seemingly nothing more than a ploy to delay: either objecting to
17 requests or stating that responsive information would be produced by an undisclosed
18 future date.

19 After extensive meet and confer efforts, Defendants agreed to amend their
20 responses to Plaintiffs initial discovery requests to address the identified deficiencies,
21 including providing "Plaintiffs with the bates range for documents responsive to each
22 interrogatory" and providing a privilege log for any objections on the basis of
23 "Privilege" and "Third Party Privacy Rights." Defendants also stated that "GNC
24 anticipate[d] making a production of documents the week of October 24th." Yet,
25 Defendants failed to provide their amended responses within the 30-day deadline for
26 the parties to resolve their discovery disputes under Judge Burkhardt's Chamber
27

1 Rules. This triggered a requirement for the parties to contact Judge Burkhardt directly
2 regarding their dispute.

3 It was only when the parties held a telephonic Discovery Conference with
4 Judge Burkhardt on November 1, 2016 that Defendants' counsel, Zana Bugaighis,
5 first proposed conditioning discovery on some undefined sampling procedure that had
6 not yet been approved by Defendants themselves. Since this Conference, Defendants'
7 counsel have demanded that Plaintiffs acquiesce to Defendants' sampling procedure
8 before the vast majority of the most vital discovery can move forward, but have not
9 provided Plaintiffs with any concrete proposed procedure. Thus, discovery has
10 slowed to a trickle. In the three months following Plaintiffs' issuance of their First Set
11 of Requests for Production of Documents and Special Interrogatories, Plaintiffs have
12 only received a few dozen responsive documents. Accordingly, Plaintiffs moved to
13 compel on December 9, 2016. Plaintiffs' position is more fully set out in their Motion
14 to Compel Further Responses to their First Set of Production of Documents and First
15 Set of Special Interrogatories. [Dkt. No. 33].

16 **B. Defendants' Contentions**

17 GNC believes any argument regarding the merits of Plaintiffs' pending motion
18 should be confined to the parties' briefing and any additional statements stricken. Due
19 to Plaintiffs' above statement, GNC notes the following:

20 Plaintiffs assert they are entitled to discovery regarding all GNC products
21 without laying a factual basis for such discovery in their Complaint. Instead,
22 Plaintiffs wish to conduct a fishing expedition into all GNC products and pricing.
23 Judge Burkhardt indicated she felt such a broad definition of relevant products and
24 pricing was improper (specifically Plaintiffs had no basis to inquire regarding
25 membership pricing) and supported GNC's proposal of a sampling procedure to
26 demonstrate to Plaintiffs that GNC's products are not similarly situated and there is no
27 basis for discovery outside the products Plaintiffs purchased. However, despite
28

1 professing willingness to confer with GNC, Plaintiffs failed to confer after receiving
2 GNC's amended discovery responses (despite Judge Burkhardt providing them a week
3 to do so) and instead moved to compel. Plaintiffs also unequivocally informed GNC
4 that they were not interested in a sampling procedure and instead believed they were
5 entitled to discovery regarding each of GNC's thousands of products. GNC's position
6 will be detailed further in its opposition to Plaintiffs' Motion to Compel.

7 To date, GNC has produced four years of sales data for both products purchased
8 by Plaintiffs and pricing calendars for the same products and time-period. GNC has
9 also produced all documents related to Plaintiffs and other documents related to GNC
10 pricing. GNC continues to review documents for production remains willing to work
11 with Plaintiffs on a sampling procedure for products outside those purchased by
12 Plaintiffs.

13 **VII. DISCOVERY MOTIONS AND/OR DIPOSITIVE MOTIONS**

14 **A. Pending Motions**

15 Plaintiffs filed their Motion to Compel Further Responses to their First Set of
16 Production of Documents and First Set of Special Interrogatories on December 9,
17 2016. [Dkt. No. 33]. Plaintiffs' motion will be heard by Judge Schopler on January
18 25, 2017, at 9:00 a.m. [Dkt. No. 35].

19 **B. Anticipated Pretrial Motions**

20 Plaintiffs intend to file a motion for class certification. Plaintiffs and/or
21 Defendants also anticipate filing motion(s) for summary judgment and/or summary
22 adjudication, if necessary.

23 The full extent of discovery and related motion practice, if any, is presently
24 unknown. To facilitate discovery, the parties hope to engage in the negotiated
25 resolution of such issues before any discovery dispute arises. Only if the parties are
26 unable to resolve such disputes will the matter be presented to the Court.

1 **VIII. OTHER RELATED CASES**

2 *Gennock, et al. v. GNC*, No. 2:16-cv-633 (W.D. Pa.).¹

3 **IX. SETTLEMENT DISCUSSIONS**

4 On August 23, 2016, the parties held an Early Neutral Evaluation conference
5 before Magistrate Judge Jill L. Burkhardt. The parties agreed that settlement
6 discussions were premature, but were willing discussing the possibility of resolution.
7 Judge Burkhardt suggested that the parties engage in expedited early discovery
8 regarding key issues to facilitate settlement discussions.

9 The parties are still conducting discovery, and thus believe settlement
10 discussions would still likely be premature. However, private mediation may present
11 the best mechanism to resolve this litigation.

12 **X. SETTLEMENT CONFERENCE**

13 The parties participated in an Early Neutral Evaluation conference before
14 Magistrate Judge Jill L. Burkhardt on August 23, 2016. Additionally, a settlement
15 conference is scheduled shortly before trial. The parties will contact the court if
16 further settlement conferences are warranted.

17 **XI. SIGNIFICANT RULINGS**

18 No rulings have been issued in this case.

19 **XII. ADDITIONAL INFORMATION**

20 None at this time.

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22 ///

23 ///

24 ///

25
26 ¹ This filing is the first time Plaintiffs were noticed regarding the pendency of a
27 related case (the *Gennock* action was not disclosed in the 26(f) Report [Dkt. No. 15]).
28 Accordingly, it is Plaintiffs' position that Defendants failed to comply with CivLR
40.1(f).

Respectfully submitted,

FINKELSTEIN & KRINSK LLP

Dated: December 29, 2016

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SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I hereby certify that the content of this document is acceptable to Sean M. Sullivan, counsel for Defendants, and that I have obtained Mr. Sullivan's authorization to affix her electronic signature to this document.

/s/ Trenton R. Kashima
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